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No. 1326

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IN THE

Supreme Court Of The United States

October Term, 1965

JOAN FLORES DELANEY,
Petitioner

vs.

UNITED SERVICES LIFE INSURANCE COMPANY,
Respondent

ANSWER OF UNITED SERVICES LIFE INSURANCE COMPANY TO PETITION FOR CERTIORARI

BOND DAVIS
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CLEMENS PRINTING CO., SAN ANTONIO, TEXAS

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IN THE

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JOAN FLORES DELANEY,
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vs.

UNITED SERVICES LIFE INSURANCE COMPANY,
Respondent

ANSWER OF UNITED SERVICES LIFE INSURANCE COMPANY TO PETITION FOR CERTIORARI

Petitioner, Joan Flores Delaney, has filed her Petition for Writ of Certiorari to review the decision of the Court of Appeals. Respondent, United Services Life Insurance Company, believes that the decision of the Court of Appeals is correct and that the Petition for Writ of Certiorari should be denied.

REPLY TO QUESTIONS PRESENTED BY PETITIONER

REPLY TO QUESTIONS 1, 2 AND 3

THERE IS NO AMBIGUITY IN THE POLICY OF INSURANCE INVOLVED IN THIS CASE, AS

THE RIDER MADE A PART OF THE POLICY CLEARLY AND EXPRESSLY EXCLUDES COVERAGE FOR DEATH OCCURRING WHILE THE INSURED WAS A PILOT ON A TRAINING FLIGHT.

Petitioner relies upon **Continental Casualty Company v. Warren,** decided by the Supreme Court of Texas and reported in 254 S.W. 2d 762,[1] in which case the pilot (Warren) was an employee of the insured business (Callery & Hurt, Inc.). Warren, an employee, was an "insured person" regardless of whether he was a pilot or a passenger, except as to limitations and exclusions contained in the policy. In order to escape liability under the policy, it was necessary for the insurer, Continental Casualty Company, to show that Warren (the pilot) was excluded from coverage afforded by the policy. This it could not do because of the ambiguity which the court found in the exclusionary language.

Judge Wisdom, in referring to **Warren,** stated in his dissenting opinion of September 26, 1962, which was adopted by the Court en banc in its opinion of March 16, 1966: "Thus, in Warren the pilot was clearly an 'insured person' in a large group all of whom apparently were meant to be covered under the policy. The conflict between this provision and the clause dealing with the injury covered produced an ambiguity

[1]In support of her argument on Questions 1, 2, and 3, Petitioner has quoted extensively from **Continental Casualty Co. v. Warren,** as reported at 248 S.W. 2d 315 and 254 S.W. 2d 762. In view of the many errors in these quotations, Respondent respectfully suggests that close reference be made to the Southwestern Reporter in considering any of Petitioner's quotations from Warren.

absent here." 308 F. 2d 484, at 489. Lieutenant Delaney was the pilot and only occupant of the plane and was not, therefore, covered under the clear and unambiguous terms of the policy. Coverage was expressly excluded by the Company in its rider (form 263) entitled LIMITATION DUE TO AVIATION HAZARD.

As will be noted in greater detail at a later point in this brief, the Court of Appeals abstained and stayed "its hand until the Courts of the State of Texas shall have declared the law of the State of Texas which is applicable to and controlling in the disposition of these appeals." Petitioner did not petition for a rehearing on that order nor appeal to this Honorable Court, but participated in the efforts made by Respondent to obtain a decision on this point by the courts of Texas, including, as directed, the court of last resort, namely, the Supreme Court of Texas.

REPLY TO QUESTION 4

THE CIRCUIT COURT OF APPEALS, PURSUANT TO RULE 32 OF "RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT," ORDERED THE MANDATE STAYED AND THEREBY RETAINED JURISDICTION OF THE CASE FOR FURTHER CONSIDERATION.

In view of proceedings before a different panel of the Court of Appeals involving **Paul Revere Life Insurance Co. v. First National Bank in Dallas**, it was

apparent that conflicting and inconsistent opinions might have been rendered by the Court of Appeals irrespective of any appeal to or action by Respondent to the Supreme Court of the United States. In order to avoid inconsistent opinions the Court of Appeals for the Fifth Circuit stayed its mandate in order that it could, as it subsequently did, order further proceedings in the case.

The original and each succeeding application for Stay of Mandate[2] filed by Respondent with the Court of Appeals pointed out and called the Court's attention to the case of **Paul Revere Life Insurance Co. v. First National Bank in Dallas** pending before another panel of the Court and emphasized that the decision in **Paul Revere** could, as it ultimately did, have an important bearing on this case.

An order was thereafter entered in **Paul Revere** that the case be submitted to the Court en banc and a similar order was thereafter entered in this case. On February 4, 1964, the Court of Appeals in a joint opinion in **Paul Revere** and **Delaney** (328 F. 2d 483) stayed further proceedings until the courts of Texas could determine the issues involved.

Paul Revere promptly filed its Petition for Writ of Certiorari to this Honorable Court, contesting the order of the Court of Appeals. The petition was denied (377 U.S. 935, 12 L.Ed. 2d 298) and Motion for Rehearing overruled (377 U.S. 973, 12 L.Ed. 2d 743).

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[2]Copy of original Application for Delay of Mandate appended as Appendix I.

Petitioner here did not appeal from or question the decision of the Court of Appeals of February 4, 1964 (328 F. 2d 483).

Respondent filed a suit for declaratory judgment in the trial court in Texas in accordance with the directive of the Court of Appeals, and Petitioner responded in that suit and joined in stipulating as to the facts without questioning jurisdiction of any court. Jurisdiction was denied by the trial court, which denial was thereafter affirmed by the San Antonio Court of Civil Appeals (386 S.W. 2d 648) and also affirmed by the Supreme Court of Texas (396 S.W. 2d 855).

Petitioner here seeks to question the jurisdiction of the Court of Appeals after having submitted to the jurisdiction of the Court for a period of over two years.

The case of **Matton Steamboat Co., Inc., et al** v. **Michael J. Murphy,** 319 U.S. 412, 87 L.Ed. 1483, involves the failure of a party in a state court action to timely file its appeal and is not in point.

This Honorable Court in **Wisniewski** v. **U.S.A.** 353 U.S. 901, 1 L.Ed. 2d 658, discussed the problem of the Courts of Appeal in conflicting decisions of different panels of a Court of Appeals and stated:

> "* * * — and desirable judicial administration commends consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals — * * * ."

This Honorable Court then held:

> "It is primarily the task of a Court of Appeals to reconcile its internal difficulties."

The Court of Appeals for the Fifth Circuit, by its rules (Rule 32), provides for staying a mandate and even provides that a mandate may be recalled to prevent injustice. In the case of **Sun Oil Co., et al** v. **Burford et al**, 130 F. 2d 10 (reversed by the United States Supreme Court on other grounds, 319 U.S. 315, 87 L.Ed. 1424), the Court did in fact **recall** its mandate and set aside its prior opinion and reverse and remand the case to the trial court.

As stated by this Honorable Court in **Western Pacific R.R. Corp., et al** v. **Western Pacific R.R. Co., et al**, 345 U.S. 247, 97 L.Ed. 986, at 990 and 991, in discussing 28 U.S.C. Section 46(c) which is addressed to the Court of Appeals, not to litigants: "It is a grant of power. It vests in the court the power to order hearings en banc. * * * The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing."

The Court of Appeals pursuant to its own rules stayed the mandate and thereby **retained jurisdiction** of this case as stated by Petitioner (Petition p. 16). In order to avoid a conflicting opinion in this case and **Paul Revere**, it heard both cases jointly en banc and thereby applied the law consistently and avoided the injustice that would have resulted from conflicting decisions.

REPLY TO QUESTION 5

THE COURT OF APPEALS FOUND NO AMBIGUITY IN THE POLICY ISSUED BY RESPONDENT TO LIEUTENANT DELANEY. DUE PROCESS WAS NOT DENIED.

It granted Respondent's Motion for Rehearing, vacated its prior decision of September 26, 1962, and reversed and remanded the case for the reasons stated in the dissenting opinion of Judge Wisdom on the first hearing. The Court further stated that **Delaney** could not be distinguished from its decision in **Paul Revere.**

Paul Revere merely held that **Warren** was not applicable to the facts there involved. This precise point was in issue before the trial court and was dealt with fully by Judge Wisdom in his dissenting opinion, the reasoning of which was adopted by the Court of Appeals en banc. Petitioner's case was fully presented to and heard by the trial court on agreed Stipulations of Facts. Petitioner briefed and argued her case to a panel of three judges and was thereafter permitted to file a brief with the Court of Appeals for the Fifth Circuit en banc before the case was finally decided by that Court. There was no denial of due process.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit is not in conflict with the

decision of any other Court of Appeals. The Court of Appeals for the Fifth Circuit endeavored to have the Courts of the State of Texas determine the law applicable to this and two companion cases, but while the trial courts decided the other two cases in favor of the insurance companies, the trial court in the third case (**Delaney**) held that it had no jurisdiction to give the requested determination. This latter decision was affirmed by the Supreme Court of Texas, thereby disposing of all three cases in the state courts of Texas. Thereafter the Court of Appeals for the Fifth Circuit properly construed the applicable state law and resolved the three cases involved in favor of the insurance companies. Respondent respectfully submits that the Petition should be denied.

BOND DAVIS
Attorney for Respondent

Of Counsel:
BOYLE, WHEELER, GRESHAM, DAVIS & GREGORY
2100 National Bank of Commerce Building
San Antonio, Texas 78205

CERTIFICATE OF SERVICE

It is hereby certified that service of this Answer has been made on opposing counsel by depositing two (2) copies thereof in the United States mail with postage prepaid, addressed to Horace P. Shelton, Jr., 1170 North Star Mall, San Antonio, Texas 78216, on the ..... day of June, 1966.

BOND DAVIS
Attorney for Respondent

Appendix I

IN THE

United States Court Of Appeals

For The Fifth Circuit

No. 19,531

UNITED SERVICES LIFE INSURANCE COMPANY,
Appellant

vs.

JOAN FLORES DELANEY,
Appellee

Application For Delay of Mandate

TO SAID HONORABLE COURT:

Defendant, United Services Life Insurance Company (Appellant), respectfully requests that the issuance of a mandate in the above entitled cause be delayed thirty (30) days beyond the regular time provided in order that the case of Paul Revere Life Insurance Company, Appellant vs. First National Bank in Dallas, Administrator of the Estate of Loy Thomas Brown, Deceased, Appellee, pending before this Honorable Court, on appeal from the United

States District Court for the Northern District of Texas, under cause No. 19,604, involving a similar situation to the above-captioned suit and an interpretation of the case of Continental Casualty Company vs. Warren, 254 S.W. 2d 762, by the Supreme Court of Texas, can be decided.

As grounds for such application Defendant respectfully represents to the Court that the outcome of the case of Paul Revere Life Insurance Company vs. First National Bank in Dallas could shed further light on the matters involved. Defendant further shows the Court that it has heretofore filed a good and sufficient Supersedeas Bond in this case.

WHEREFORE, Defendant (Appellant) respectfully requests that the United States Court of Appeals for the Fifth Circuit grant this application and direct the Clerk of the Court to delay the issuance of the mandate from November 6, 1962, to December 6, 1962.

Respectfully submitted,

s/BOND DAVIS

BOND DAVIS
Attorney for Appellant

Of Counsel:
BOYLE, WHEELER, GRESHAM, DAVIS & GREGORY
2100 National Bank of Commerce Building
San Antonio, Texas 78205

I, the undersigned, Bond Davis, designated attorney of record for the Appellant in the above entitled cause, do hereby certify to the Court that the foregoing Application for Delay of Mandate was filed in good faith and not for purposes of delay.

This the 31st day of October, 1962.

s/BOND DAVIS

BOND DAVIS

I, the undersigned, Bond Davis, designated attorney of record for the Appellant in the above entitled cause, do hereby certify that on the 31st day of October, 1962, I delivered to Horace P. Shelton, attorney for Appellee, 625 National Bank of Commerce Building, San Antonio 5, Texas, a copy of the foregoing Application for Delay of Mandate in compliance with the Rules of Court.

This the 31st day of October, 1962.

s/BOND DAVIS

BOND DAVIS